UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DANIEL VANDERKODDE, *et al.*, Plaintiffs,	)	
	)	No. 1:17-cv-203
-v-	)	
	)	Honorable Paul L. Maloney
MARY JANE M. ELLIOTT, P.C., *et al.*, Defendants.	)	

OPINION AND ORDER GRANTING MOTION FOR CLASS CERTIFICATION

Plaintiffs allege Defendants violated the Fair Debt Collection Practices Act (FDCPA), the Michigan Regulation of Collection Practices Act (MRCPA) and the Michigan Occupational Code (MOC). Specifically, Plaintiffs contend that Defendant filed writs of garnishment that calculated post-judgment interest at a rate not authorized by statute. The request for post-judgment interest thus constituted a false statement. Plaintiff, on behalf of others similarly situated, filed a motion for class certification (ECF No. 149). The Court will grant the motion.

I.

Plaintiffs plead that Defendants filed false communications in the Michigan courts and sent false communications to Plaintiffs as part of Defendants' efforts to collect consumer debts. Specifically, Plaintiffs contend that, after obtaining a judgment in the state courts, Defendants sought post-judgment interest at a rate not authorized by statute. As a result, Plaintiffs argue that Defendants sought to collect and did collect money not owed.

The Sixth Circuit Court of Appeals summarized the events giving rise to the lawsuit and the respective roles played by the parties.

> Plaintiffs are consumers who held credit accounts with various financial institutions and later defaulted on their debts. Defendants LVNV Funding, LLC and Midland Funding, LLC bought these debts and hired defendant Mary Jane M. Elliott, P.C., a law firm, to represent them in collection proceedings. In five separate actions, Elliott filed complaints and supporting affidavits in Michigan state court against plaintiffs on LVNV's or Midland Funding's behalf. Each suit resulted in a judgment against the debtor—by default in Buck's, Robinson's, and Swagerty's cases, and by consent in Beckley's and VanderKodde's.

VanderKodde v. Mary Jane M. Elliott, P.C., 951 F.3d 397, 400 (6th Cir. 2020). Following the procedures for post-judgment garnishment, Defendants filed multiple requests for garnishment in the state court for each judgment debtor. The cause of action in this lawsuit arises from the calculation of post-judgment interest in the writs of garnishment. Michigan law provides a specific method for calculating judgment interest. *See* Mich. Comp. Laws § 600.6013. When a judgement is a written instrument, post-judgment interest can be calculated on a rate as high as thirteen percent. *Id.* § 600.6013(7). For other judgments in civil actions, the statute provides for interest at one percent above the average interest rate paid at auction of 5-year United States treasury notes. *Id.* § 600.6013(8).

> In the writs of garnishment in this case, the outstanding amounts of plaintiffs' debts were calculated using the much higher post-judgment rate of 13%. This is the maximum interest rate allowed for a judgment "rendered on a written instrument evidencing indebtedness with a specified [or variable] interest rate." MCL § 600.6013(7). But the underlying judgments here were not so rendered. The three default judgments specify that they are "not based on a note or other written evidence of indebtedness," and none of the judgments include any supporting written instrument. So, plaintiffs allege, use of the 13% rate was improper under Michigan law.

VanderKodde, 951 F.3d at 401.

In this motion, Plaintiffs seek certification of two classes and two subclasses.

Elliott Class. A class comprising: (a) every natural person; (b) against whom a money judgment, in a civil action to collect a debt incurred for personal, family, or household purposes, was entered by a Michigan court; (c) in an action in which a written instrument or promissory note specifying an interest rate of more than 3.848% was not alleged in the complaint; (d) from whom Mary Jane E. Elliott, P.C. collected or attempted to collect a judgment balance by communicating to any person, during the period from April 11, 2011 to the date of class certification, that the judgment debtor owed an amount that included judgment interest calculated at a rate of more than 3.484%

Berndt Class. A class comprising: (a) every natural person; (b) against whom a money judgment, in a civil action to collect a debt incurred for personal, family, or household purposes, was entered by a Michigan court; (c) in an action in which a written instrument or promissory note specifying an interest rate of more than 3.848% was not alleged in the complaint; (d) from whom Berndt & Associates,P.C. collected or attempted to collect a judgment balance by communicating to any person, during the period from April 11, 2011 to the date of class certification, that the judgment debtor owed an amount that included judgment interest calculated at a rate of more than 3.484%

Midland Subclass. A class comprising: (a) every natural person; (b) against whom a money judgment, in a civil action to collection a debt incurred for personal, family, or household purposes, was entered by a Michigan court in favor of Midland Funding, LLC; (c) in an action in which a written instrument or promissory note specifying an interest rate of more than 3.848% was not alleged in the complaint; (d) from whom Mary Jane E.

Elliott, P.C. or Berndt & Associates, P.C. collected or attempted to collect a judgment balance by communicating to any person, during the period from April 11, 2011 to the date of class certification, that the judgment debtor owed an amount that included judgment interest calculated at a rate of more than 3.484%

LVNV Subclass. A class comprising: (a) every natural person; (b) against whom a money judgment, in a civil action to collection a debt incurred for personal, family, or household purposes, was entered by a Michigan court in favor of LVNV Funding, LLC; (c) in an action in which a written instrument or promissory note specifying an interest rate of more than 3.848% was not alleged in the complaint; (d) from whom Mary Jane E. Elliott, P.C. or Berndt & Associates, P.C. collected or attempted to collect a judgment balance by communicating to any person, during the period from April 11, 2011 to the date of class certification, that the judgment debtor owed an amount that included judgment interest calculated at a rate of more than 3.484%.

II.

A. Article III Standing

Defendant Elliott argues that the named plaintiffs lack constitutional standing because they have not suffered concrete injuries.[1] Defendant reasons that Plaintiffs plead "that their debt wouldn't be satisfied even if the lower interest rate were charged. So they haven't suffered any actual economic harm" (ECF No. 157 at 24 PagerID.2809). Defendant's standing argument functions as a facial challenge, a challenge that focuses on the factual allegations in complaint. *See Enriquez-Perdmom v. Newman*, 54 F.4th 855,

[1] ECF No. 157 at 24 Argument III.A PageID.2809

861 (6th Cir. 2022). In a facial attack, the court accepts as true all the allegations in the complaint. *Id.*

The allegations in the complaint contain sufficient facts to establish a concrete injury for each named plaintiff.[2] Plaintiffs plead that Defendant Elliott filed writs of garnishment against Susan Buck, Anita Beckley, Ruby Robinson, and Daniel VanderKodde, writs that calculated accrued interest at a rate not authorized by statute. Plaintiffs also plead that Defendant Elliott collected some money from Buck, Beckley, Robinson and VanderKodde after filing writs of garnishment. Plaintiffs plead the specific amounts that were collected. Taking these allegations as true, Defendants used false communications to collect Plaintiffs' money from third parties. While it may be that Defendants did not collect more than Plaintiffs would owe if the accrued interest had been accurately calculated, that dispute concerns damages, not Article III standing. *See generally Warth v. Seldin*, 422 U.S. 490, 498-99 (1975) (explaining that the standing inquiry concerns whether the plaintiff has established a case or controversy between the parties and whether the plaintiff has a personal stake in the outcome of that dispute). Courts must avoid "conflat[ing] Article III's injury-in-fact requirement with the merits." *Hick v. State Farm Fire and Cas. Co.*, 965 F.3d 452, 463 (6th Cir. 2020); *see, e.g., Stuart v. State Farm Fire and Cas. Co.*, 910 F.3d 371, 377 (8th Cir. 2018) ("State Farm argues that plaintiffs who completed their repairs at or below the cost of the ACV payment, or who ultimately received RCV payments, have suffered no injury and accordingly lack standing. Although couched as disputes about standing, State Farm's arguments really go to the merits of

[2] The Court previously granted a motion to dismiss Swagerty on standing grounds.

plaintiff's claims. Under plaintiff's theory, all individuals who received an improperly-depreciated ACV payment suffered a legal injury—breach of contract—regardless of whether the ACV payment was more than, less than, or exactly the same as the ultimate cost or repairing or replacing their property. ... Whether some plaintiffs are unable to prove damages because they eventually recouped the withheld depreciation through an RCV payment is a merits question, ...").

B. Statutory Standing

Defendant Elliott also argues that Plaintiffs lack statutory standing for the MRCPA claim.[3] The relevant statute provides that "[a] person who suffers injury, loss, or damage, or from whom money was collected by the use of a method, act, or practice in violation of this act may bring an action for damages or other equitable relief." Mich. Comp. Laws § 445.257(1). Defendant argues that the named plaintiffs did not suffer any injury, loss or damage from the use of the 13% interest rate. Using the same reasoning as the argument for constitutional standing, Defendant contends that "Elliott hasn't collected a penny more from [Plaintiffs] than it would have if it used the variable rate that they claim was required" (ECF No. 157 at 20 PageID.2805). Defendant also argues that it did not collect any money "by use of" a statutory violation because the money collected would have been collected regardless of the interest rate (*id.*)

In every lawsuit, the plaintiff must have both constitutional standing and statutory standing. *See Jordan v. Tyson Foods, Inc.*, 257 F. App'x 972, 977 (6th Cir. 2007); *accord United States v. All Funds on Deposit with R.J. O'Brien & Assocs.*, 783 F.3d 607, 617 (7th

[3] ECF No. 157 at 18 Argument II.A PageID.2803

Cir. 2015). Courts resolve statutory standing disputes by applying a zone-of-interest test. *Gaetano v. United States*, 994 F.3d 501, 507 (6th Cir. 2021); *see Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127-28 (2014). Examining the relevant statute, a court must decide whether the legislature created a cause of action for this particular plaintiff. *Lexmark Int'l*, 572 U.S. at 127-28. Statutory standing therefore concerns the merits of a cause of action, not subject-matter jurisdiction. *Roberts v. Hamer*, 655 F.3d 578, 581 (6th Cir. 2011). And, courts analyze statutory standing challenges under Rule 12(b)(6). *See, e.g., Traverse Bay Area Intermediate Sch. Dist. v. Michigan Dept. of Educ.*, 615 F.3d 622, 626-27 (6th Cir. 2010).

Plaintiffs fall within the zone of interest of Michigan's Regulation of Collection Practices Act. Plaintiffs plead that Defendant collected money from each of the plaintiffs by the use of writs of garnishment, writs that contained inaccurate statements about the amount of post-judgment interest owed. Section 445.257(1) permits a lawsuit by a person "from whom money was collected by the use of a method, act, or practice in violation of this act[.]" Section 445.252 sets forth the prohibited acts. Plaintiffs plead that the defendants violated subsections (e), (f)(i) and (f)(ii). Viewing the allegations in the complaint as true, Plaintiffs have pled a viable cause of action and, therefore, the allegations in the complaint allege a factual basis for statutory standing.

That Defendant did not collect enough money to satisfy the underlying judgment against any one plaintiff does not undermine statutory standing. In their reply brief, Plaintiffs point out that, under Michigan law, partial payments apply to the interest first, and then to the principal. *Niggeling v. Michigan Dept. of Transp.*, 488 N.W.2d 791, 793

(Mich. Ct. App. 1992) (citing *Wallace v. Glaser*, 46 N.W 227, 227 (Mich. 1890)).[4] Following this rule, the money collected by Defendant was applied to the allegedly unlawful interest first, and not to the judgment principal.

III.

Defendant Elliott asserts multiple concerns about the viability of a class. Class actions lawsuits constitute an "'exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (citation omitted). Because a class action lawsuit aggregates claims and parties, the lawsuit "magnifies the stake of the litigation and can thus have massive ramifications for plaintiffs and defendants alike." *In re Ford Motor Co.*, 86 F.3d 723, 726 (6th Cir. 2023). Rule 23 of the Federal Rules of Civil Procedure sets forth the requirements for a class action and "serves as a gatekeeper to class certification." *Id.* District courts maintain "substantial discretion" when determining whether to certify a class. *Rikos v. Proctor & Gamble Co.*, 799 F.3d 497, 504 (6th Cir. 2015).

Rule 23 requires the party seeking class certification to meet the four requirements in subsection (a) and at least one requirement in subsection (b). *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 345 (2011). The four requirements in subsection (a)—numerosity, commonality, typicality, and adequacy of representation—assure that the claims of the named plaintiffs share the same interests and injuries as the class members. *In re*

[4] In the portion of their response brief discussing consent judgments and the post-judgment interest rate, Defendant Elliott cites *Norman v. Norman*, 506 N.W.2d 254 (Mich. Ct. App. 1993) (ECF No. 157 at 28 PageID.2813). The *Norman* opinion references the same rule interest-first rule for partial payments, citing both *Wallace* and *Niggeling*. *Norman*, 506 N.W.2d at 255.

Whirlpool Corp. Front-Loading Washer Prods. Liability Litig., 722 F.3d 838, 850 (6th Cir. 2013). Rule 23(a) provides that a named party may sue as a representative party on behalf of all members of a class only if:

> (1) the class is so numerous that joinder of all members is impracticable;
> (2) there are questions of law or fact common to the class;
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). In this lawsuit, Plaintiffs rely on subsection (b)(3), which requires the party seeking to certify a class to show predominance and superiority. *Id.* at 858. The party seeking class certification bears the burden of establishing the Rule 23 requirements. *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 537 (6th Cir. 2012).

District courts must conduct a "rigorous analysis" to assure that the moving party satisfies Rule 23. *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 161 (1982); *Young*, 693 F.3d at 537 (citing *Dukes*, 564 U.S. at 351). The court's analysis does not apply Rule 23 as a pleading standard and the moving party must do more than merely repeat the language found in the rule. *Young*, 693 F.3d at 537. "Ordinarily, this means that the class determination should be predicated on evidence the parties present concerning the maintainability of the class action" and "the district court should not merely presume that the plaintiffs' allegations in the complaint are true for the purposes of class motion without resolving factual and legal issues." *Id.* However, when the parties do present factual or legal disputes in the certification process, the district court does not have to "'probe behind

the pleadings before coming to rest on the certification issue.'" *Gooch v. Life Investors Inc. Co. of America*, 672 F.3d 402, 417 (6th Cir. 2012) (quoting *Dukes*, 564 U.S. at 350).

A. Class Definition

After the parties filed the motion for class certification, the Court granted a motion to dismiss. Defendant Berndt & Associates asserted that Plaintiff Ritchie Swagerty lacked standing to sue. Berndt & Associates reasoned that, while the writs of garnishment may have contained inaccurate information, no defendant ever collected any money from Swagerty. The Court granted the motion. Based on the pleadings, none of the remaining plaintiffs have a claim against Berndt & Associates. The parties have not proposed any alternative class definitions.

The Court exercises its discretion and will redefine the proposed classes. *See Hicks v. State Farm Fire and Cas. Co.*, 965 F.3d 452, 462 (6th Cir. 2020) ("The district court has the power to amend the class definition at any time before judgment."); *Powers v. Hamilton Cty. Pub. Def. Comm'n*, 501 F.3d 592, 619 (6th Cir. 2007) (stating that "district courts have broad discretion to modify class definition, ..."). Because no plaintiff has a claim against Berndt & Associates, the Court finds no need to have a "Berndt Class." And, without a Berndt Class, the Court finds no need to have an "Elliott Class" with two subclasses. Rather, the Court will consider the two subclasses as the two proposed classes, with a few edits and alterations. In addition, in light of the Court's conclusion about Swagerty's standing and the discussion of standing (both Article III and statutory) above, the Court will define the class to include only individuals from whom money was actually collected following a writ of garnishment.

Elliott/Midland Class. A class comprising of the following: (a) every natural person; (b) against whom a money judgment, in a civil action to collect a debt incurred for personal, family, or household purposes, was entered by a Michigan court in favor of Midland Funding, LLC; (c) in an action in which a written instrument or promissory note specifying an interest rate of more than 3.848% was not alleged in the complaint; (d) from whom Mary Jane E. Elliott, P.C. collected a judgment balance by communicating to any person, during the period from April 11, 2011 to the date of class certification, that the judgment debtor owed an amount that included judgment interest calculated at a rate of more than 3.484%

Elliott/LVNV Class. A class comprising: (a) every natural person; (b) against whom a money judgment, in a civil action to collect a debt incurred for personal, family, or household purposes, was entered by a Michigan court in favor of LVNV Funding, LLC; (c) in an action in which a written instrument or promissory note specifying an interest rate of more than 3.848% was not alleged in the complaint; (d) from whom Mary Jane E. Elliott, P.C. collected a judgment balance by communicating to any person, during the period from April 11, 2011 to the date of class certification, that the judgment debtor owed an amount that included judgment interest calculated at a rate of more than 3.484%.

B. Rule 23(a) Considerations

1. Numerosity

Rule 23(a)(1) provides that the class must be large enough that "joinder of all members is impracticable." "There is no strict numerical test for determining impracticability of joinder." *In re American Med. Sys., Inc.*, 75 F.3d 1069, 1079 (6th Cir.

1996). "However, sheer numbers of potential litigants in a class, especially if it is more than several hundred, can be the only factor needed to satisfy Rule 23(a)(1)." *Bacon v. Honda of America Mfg., Inc.*, 370 F.3d 565, 570 (2004) (citation omitted). Although the moving party does not have plead or prove the exact number of class members, the party most show impracticability, which "cannot be speculative." *Golden v. City of Columbus*, 404 F.3d 950, 966 (6th Cir. 2005) (citation omitted).

Plaintiffs have demonstrated numerosity. Plaintiffs submitted filings from seventeen lawsuits filed in the 63rd District Court located in Kent County, Michigan. In each case, Midland Funding filed the lawsuit with Mary Jane E. Elliott acting as counsel. Plaintiffs also submitted filing from twelve lawsuits filed in the 63rd District Court by LVNV with Mary Jane E. Elliott acting as counsel. Plaintiffs contend that each lawsuit involved a complaint, judgment and a writ of garnishment. Plaintiffs further contend that the writs of garnishment calculate interest at a rate not authorized by statute. Plaintiffs reason that the lawsuits in one district court merely illustrate the size of the class, which would cover all 160 Michigan courts in which collections actions might be filed. On these facts, Plaintiffs have demonstrated that joinder would be impracticable.

2. Commonality

Rule 23(a)(2) requires that "there are questions of law or fact common to the class." Generally, '[c]ommonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'" *Dukes*, 564 U.S. at 349-50 (citation omitted). More specifically, the claims of the class members "must depend upon a common contention" and that common contention "must be of such a nature that it is capable of classwide

resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* at 350. "In other words, named plaintiffs must show that there is a common question that will yield a common answer for the class (to be resolved at the merits stage), and that the common answer related to the actual theory of liability in the case." *Rikos*, 799 F.3d at 505.

Plaintiffs have demonstrated commonality. Central to the claims of the named plaintiffs and every potential member of the class is whether Defendant made a false or deceptive statement in a communication connected with the collection of a debt, in particular whether the writs of garnishment calculated post-judgment interest at a rate not authorized by law. The answer to that inquiry will affect the claims of every member of the class. "Where the same conduct or practice by the same defendant gives rise to the same kind of claims from all class members, there is a common question." *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 756 (7th Cir. 2014) (collecting cases); *see Appoloni v. United States*, 218 F.R.D. 556, 561 (W.D. Mich. 2003) ("The commonality requirement is generally met where the defendant engaged in standardized conduct towards members of the proposed class."); *Gilkey v. Cent. Clearing Co.*, 202 F.R.D. 515, 521 (E.D. Mich. 2001) ("When the legality of the defendant's standardized conduct is at issue, the commonality factor is normally met ....").

3. Typicality

Rule 23(a)(3) provides that the "claims and defenses of the representative parties are typical of the claims of the class." A plaintiff establishes typicality by showing that his or claim "arises from the same even or practice or course of conduct that gives rise to the

claims of other class members, and if his or her claims are based on the same legal theory." *In re American Med. Sys.*, 75 F.3d at 1082 (citation omitted). By pursuing their own claims, the named plaintiffs advance the interest of the entire class. *Young*, 693 F.3d at 542. Frequently, the commonality and typicality factors overlap or merge because the two factors "serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so intertwined that the interests of the class members will be fairly and adequately protected in their absence." *In re Whirlpool Corp.*, 722 F.3d at 853 (quoting *Dukes*, 564 U.S. at 349 n.5).

Plaintiffs have established the typicality factor. The claims of the named plaintiffs arise from the same practice or course of conduct—the allegedly false statement contained in the writs of garnishment—that gives rise to the claims of all of the class members. By litigating their own claims, Plaintiffs advance the interests of the entire class.

4. Adequacy of Representation

Rule 23(a)(4) demands that the named plaintiffs, as representative parties, "fairly and adequately protect the interests of the class." While this fourth factor may overlap with both commonality and typicality, the "adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent" *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997). The Sixth Circuit employs a two-prong test for the adequacy-of-representation factor: (1) the named plaintiff must have common interests with the unnamed members of the class and (2) it must appear that the

named plaintiffs will vigorously prosecute the interests of the class through qualified counsel. *In re American Med. Sys.*, 75 F.3d at 1083.

Plaintiffs have established the adequacy-of-representation factor. For the same reasons that Plaintiffs satisfy the commonality and typicality factors, Plaintiffs satisfy this fourth factor. Plaintiffs' interests in their own causes of action overlaps entirely with the interests of the absent members of the class. No party has argued or suggested that the named plaintiffs have any conflict with the interests of the absent members of the class.

C. Rule 23(b)(3)

If a court finds that a proposed class meets the four elements in Rule 23(a), the court must next consider whether the proposed class falls under one of the three categories in Rule 23(b). Rule 23(b)(3) permits a court to certify a class when "questions of law or fact common to class members predominate over any questions affecting only individual members." In addition, the rule requires the court to find that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). "The predominance inquiry asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." *Tyson Foods, inc. v. Bouaphakeo*, 577 U.S. 447 442, 453 (2016) (internal quotation marks and citation omitted). Where commonality considers if a single factual or legal question applies to the class, predominance considers whether that "common question is at the heart of the litigation." *Powers*, 501 F.3d at 619.

Plaintiffs have established that the questions common to all of the class members predominate over questions that would require individualized proof. The question of

whether the writ of garnishments contained false statements is both the common and the predominant question. Because that question and its answer substantially advance resolution of this lawsuit, the Court finds that a class action is a superior method for adjudicating the controversy.

D. Defendant's Other Concerns

In considering the Rule 23 factors, the Court has addressed some of the concerns identified by Defendant Elliott in the response brief. Defendant raises other arguments that did not neatly fit within the discussion of the factors in Rule 23(a) and (b).

1. Consumer Debt

Defendant argues that, because of the particular statutes that provide for the causes of action, the class must be limited to individuals with consumer debt. Defendant argues that inquiry will require individual proof. To address this concern, courts have defined the class to cover only debts incurred for personal, family or household purposes. *See Roundtree v. Bush Ross, P.A.*, 304 F.R.D. 644, 651-52 (M.D. Fla. 2015). Class members could be asked to confirm that their debt qualifies as consumer debt on the claim form. *Butto v. Collecto Inc.*, 290 F.R.D. 372, 383 (E.D.N.Y. 2013) (quoting *Marcarz v. Transworld Sys., Inc.*, 193 F.R.D. 46, 57 (D. Conn. 2000)). Alternatively, class members could be asked to submit the credit card statement to establish the nature of the transaction. *See Gold v. Midland Credit Mgt., Inc.*, 306 F.R.D. 623, 629 (N.D. Cal. 2014). Accordingly, this Court agrees with the many other courts that have found that consumer debt concern "does not require individual determinations that would trump the predominance of the legal issues commonly applicable to the putative class members."

Collins v. Erin Capital Mgmt., LLC, 290 F.R.D. 689, 700 (S.D. Fla. 2013). "[M]ultiple courts have held that a plaintiff need not prove the nature of the debt at the class certification stage in an FDCPA action." *Holzman v. Malcolm S. Gerald & Assocs., Inc.*, 334 F.R.D. 326, 334-35 (S.D. Fla. 2020 (collecting cases).

Defendant Elliott characterizes the consumer debt issue as a question of ascertainability. The Sixth Circuit has found that Rule 23(b)(3) contains an "implied ascertainabilty requirement." *Sandusky Wellness Ctr., LLC v. ASD Speciality Healthcare, Inc.*, 863 F.3d 460, 466 (6th Cir. 2017) (citing *Cole v. City of Memphis*, 839 F.3d 530, 541 (6th Cir. 2016)). The implied ascertainability requirement demands that the "class definition must be sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member of the proposed class."[5] *Id.* at 471 (quoting *Young*, 693 F.3d at 537-38); *see Rikos*, 799 F.3d at 525 ("In our circuit, the ascertainability inquiry is guided by *Young v. Nationwide Mutual Insurance Co.*, 693 F.3d 532 (6th Cir. 2012)."). "[T]he court must be able to resolve the question of whether class members are included or exclude from the class by reference to objective criteria." *Rikos*, 799 F.3d at 525 (quoting *Young*, 693 F.3d at 538).

The class definitions satisfy the ascertainabilty requirement. The class definitions rely on objective criteria. *See Rikos*, 799 F.3d at 526. Defendant focuses not on the definition and the objective criteria, but on the administrative feasibility of the class. But Defendant's argument, that proof of the nature of the underlying debt would necessitate

[5] Defendant quotes *Carrera v. Bayer Corporation*, 727 F.3d 300, 307 (3d Cir. 2013) (ECF No. 157 at 10 PageID.2795). The Sixth Circuit rejected the holding in *Carrera* as inconsistent with *Young*. *Rikos*, 799 F.3d at 525.

"extensive and individualized fact-finding or 'mini-trials'" (ECF No. 157 at 17 PageID.2802), overstates the difficulty of any inquiry or proof that might be necessary. And, contrary to Defendant's assertion, the named plaintiffs do have some evidence in the record to show that their debt was incurred for personal purchase or was not incurred for business purposes. (ECF No. 164-3 Beckley Dep. at 27 PageID.2921; ECF No. 164-4 Buck Dep. at 22 PageID.2928; ECF No. 164-6 VanderKodde Dep. at 21 PageID.2940).

2. Consent Judgments

Defendant argues that the class definitions include individuals who consented to the use of the thirteen percent interest rate. Plaintiff Anita Buckley's judgment was a consent judgment that included a thirteen percent rate of interest (ECF No. 5-11 PageID.83), as was the judgment against Plaintiff Daniel VanderKodde (ECF No. 5-34 PageID.135).

Michigan law does not treat consent judgments as "mere contracts between the parties." *Madison v. City of Detroit*, 452 N.W.2d 883, 885 (Mich. Ct. App. 1990). "{O]nce a consent judgment is entered, it becomes a judicial act and possesses the same force and character as a judgment rendered following a contested trial or motion." *Trendell v. Solomon*, 443 N.W.2d 509, 510-11 (Mich. Ct. App. 1989). That said, consent judgments are "in the nature of a contract" and a court "must accept and enforce contractual language as written, unless the contract is contrary to law or public policy." *Laffin v. Laffin*, 760 N.W.2d 738, 740 (Mich. Ct. App. 2008).

Individuals who agreed to a consent judgment may still be part of the proposed class. Neither Buckley nor VanderKodde consented to calculating post–judgment interest at thirteen percent. The consent judgments calculate *prejudgment* interest ("judgment

interest accrued thus far...") using the thirteen percent interest rate. *VanderKodde*, 951 F.3d at 403. The consent judgments do not provide any basis for concluding that the named plaintiffs or class members also agreed to calculate post-judgment interest at the same rate. *See Madison*, 452 N.W.2d at 702 ("In this instance, postjudgment interest is authorized by statute. Since the award of such interest was neither limited by the judgment nor waived by the parties, we hold that the lower court erred by denying plaintiff's motion for postjudgment interest."). Indeed, the Sixth Circuit found error in this Court's previous opinion holding that the thirteen percent rate of interest used to calculate post-judgment interest was part of the judgment from the underlying lawsuit and subject to *Rooker-Feldman*. *VanderKodde*, 951 F.3d at 403-04.

3. Other Class-Action Settlements

Defendant argues that the class definitions include individuals who released claims against Defendant Elliott in other lawsuits. Defendant points to the settlement in *Hunter v. Mary Jane M. Elliott, P.C.*, No. 1:13cr1338 (W.D. Mich.). Defendant contends that the claims in this lawsuit could have been asserted in the *Hunter* lawsuit.[6]

The release in the *Hunter* lawsuit does not extend to the disputed interest-rate claims giving rise to this lawsuit. The language of the release in the *Hunter* lawsuit resolves this concern. The settlement agreement in *Hunter* defined "Released Claims" to mean

> For the Class, all claims, actions, causes of action, demands, rights, damages, costs, attorney's fees and expenses, other than those provided for in this

[6] The Court does not interpret Defendant's argument as raising res judicata. Defendant does not mention that term and does not include any discussion of the elements of res judicata or any similar doctrine. Furthermore, in *Hilliard v. Shell Western E & P, Inc.*, 885 F. Supp. 169, 172-173 (W.D. Mich. 1995), Judge Quist declined to broadly apply res judicata in the context of a class action.

> Agreement and compensation whatsoever that the Class or the Class Members' respective heirs, agents, executors, administrators, successors, assigns, and attorneys asserted or could have asserted against Defendants as a result of the pleadings and conduct alleged to be the basis of this Litigation.

(ECF No. 164-18 at 7 PageID.3022). The critical language in this release appears at the end: "as a result of the pleadings and conduct alleged to be the basis of this Litigation." The amended complaint in the *Hunter* lawsuit asserted a claim arising from requests for costs contained in writs garnishment. The members of the *Hunter* class released any claims arising from the "conduct alleged to the be the basis of this Litigation," meaning the requests for cost in the writs of garnishment. The *Hunter* plaintiffs did not allege that Elliott improperly calculated interest in the writs of garnishment.

IV.

Plaintiffs have requested the Court approve a class based on the uniform conduct of Defendant Elliott. The conduct allegedly violated the Fair Debt Collection Practices Act and two Michigan statutes. The Court finds that the allegations and the record support Plaintiffs request and approves two classes. Because the Court dismissed one of the named plaintiffs and a defendant before Plaintiffs filed this motion, the Court has modified the proposed class definitions to reflect the current parties, their relationships and the claims.

ORDER

For the reasons provided in the accompanying Opinion, the Court **GRANTS** Plaintiffs' motion for class certification (ECF No. 149). **IT IS SO ORDERED.**

Date: March 1, 2024

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge